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In the Supreme Court of the United States

October Term, 1980

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL.,
Petitioners,

vs.

JONEZ P. SUTHOFF, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VARDAMAN S. DUNN
(Counsel of Record)
Post Office Box 1046
Jackson, Mississippi 39205

W. F. GOODMAN, JR.
Post Office Box 650
Jackson, Mississippi 39205

HALEY BARBOUR
Post Office Box 960
Yazoo City, Mississippi 39194

WILLIAM T. JONES
Post Office Drawer 119
Jackson, Mississippi 39205
Attorneys of Record for Petitioners

(Of Counsel on Inside Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

Of Counsel:

Cox & Dunn, Ltd.
Post Office Box 1046
Jackson, Mississippi 39205

Watkins & Eager
Post Office Box 650
Jackson, Mississippi 39205

Henry, Barbour & DeCell
Post Office Box 960
Yazoo City, Mississippi 39194

Brunini, Grantham, Grower & Hewes
Post Office Drawer 119
Jackson, Mississippi 39205

QUESTIONS PRESENTED FOR REVIEW

1. The question is one of federal court jurisdiction under 42 U.S.C., §1983 (civil rights) and 28 U.S.C., §§1331 and 1343(3) as applied to an action involving a *negotiated* real estate transaction between individual landowners and a state agency, in which the Complaint alleges that the plaintiffs were induced by fraud and deceit to sell and convey their land to the public authority for something less in cash than its true value.

2. Does the mere conclusory allegation that the plaintiffs lost rights "secured by the Constitution of the United States" in such a commercial transaction of daily occurrence suffice to convert the resulting classic common law tort into a federal constitutional issue and pre-empt the traditional resolution of such issues by state courts?

3. Is the common law right of persons to be free of the alleged tort of fraud in a real estate transaction and to obtain consequent relief in the form of rescission and damages for "fraud and deceit", if the allegations are sustained, one which is "secured by the Constitution of the United States" in the jurisdictional sense of 28 U.S.C., §§1331 and 1343(3), merely because the alleged tort is charged against a public agency or a person acting in its behalf in the course of contract negotiations?

4. Can federal jurisdiction, not otherwise existing, be invoked on the allegation that one state agency, in conspiracy with others, filed an eminent domain action as one means of inducing a negotiated contractual sale and conveyance of property for the public use at a price below its true value?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1
OPINIONS BELOW 2
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
ARGUMENT AMPLIFYING THE REASONS FOR ALLOWANCE OF THE WRIT 5
A. Summary of Reasons 5
B. Statement of General Principles 7
C. The Decision Below Conflicts With Applicable Decisions of This Court 11
D. Cases Distinguished 14
E. There Is a Direct Conflict With Other Circuits 16
CONCLUSION 21
APPENDIX TO PETITION—
A. Memorandum Opinion: United States District Court for Southern District of Mississippi A1
B. Opinion: Fifth Circuit (637 F.2d 337) A5
B-1 Opinion: Fifth Circuit - on Petition for Rehearing A13
C. 42 U.S.C., §1983 ..... A16
28 U.S.C., §1331 ..... A16
28 U.S.C., §1343 ..... A17
Constitution of the United States (Fifth Amendment) A17
Constitution of the United States (Fourteenth Amendment) A18
Mississippi Constitution A18
Miss. Code of 1972, §59-9-19 ..... A19

Cases Cited

Albrecht v. United States, 329 U.S. 599, 67 S.Ct. 606 (1947) 10
Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979) 5, 8, 11
Beistline v. City of San Diego, 256 F.2d 421 (CA 9, 1958) 5, 8, 13, 16, 17, 20
Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946) 14
Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972) 10
Brown v. Ohman, 42 So.2d 209 (Miss. 1949) 12
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 99 S.Ct. 1905 (May 14, 1979) 7
Guedry v. Ford, 431 F.2d 660 (CA 5, 1970) 8
Gully v. First National Bank of Meridian, 299 U.S. 109, 57 S.Ct. 96 (1936) 9, 10
Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) 14
Parker v. State Highway Commission, 173 Miss. 213, 162 So. 162 (1935) 12
Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) 5, 7, 11, 15
Pierre v. Jordan, 333 F.2d 951 (CA 9, 1964) 13
Schroeder v. Federal National Mortgage Association, 432 F.Supp. 114 (D.C., Puerto Rico, 1977) 8
Walker v. Bank of America National Trust & Savings Association, 268 F.2d 16 (CA 9, 1959) 13, 14
Warrington Sewer Company v. Tracy, 463 F.2d 771 (CA 3, 1972) 5, 8, 14, 17, 19

Constitutional Provisions and Statutes

Constitution of the United States (Fifth Amendment) 2, 8

Constitution of the United States (Fourteenth Amendment) 2, 7, 8, 16
Constitution of Mississippi (1890) (Art. 3, §17) 2
28 U.S.C., §1254(1) 2
28 U.S.C., §1331 ..... 2, 8, 16
28 U.S.C., §1343(3) 2, 8, 11
42 U.S.C., §1983 ..... 2, 3, 6, 7, 11
Miss. Code of 1972, §59-9-19 10

TEXTS

37 Am.Jur.2d., *Fraud and Deceit*, 33, §12 12

No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Yazoo County Industrial Development Corporation, et al., defendants-appellees below, pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its decision entered February 17, 1981, reversing the District Court's order dismissing the complaint of Jonez P. Suthoff, et al., for failure to state a claim over which it had subject matter jurisdiction. The parties are listed in the footnote.*

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*The parties are listed as follows: Petitioners are: Yazoo County, Mississippi; Yazoo County Port Commission; Yazoo Industrial Development Corporation; Yazoo City, Mississippi; Yazoo Public Service Commission; Tom Campbell, Jr.; E. A. Smith; William H. Barbour; William T. Neely; and Joel Stevenson. Respondents are: Jonez P. Suthoff; Frances P. Miller and Inez W. Philbert.

OPINIONS BELOW

The opinion of the United States District Court is not officially reported. (Apx. A) The opinion of the Court of Appeals for the Fifth Circuit is reported at 637 F.2d 337. (Apx. B) The opinion on Petition for Rehearing is attached. (Apx. B-1) All are appended.

JURISDICTION

Jurisdiction is based on 28 U.S.C., §1254(1). The Court of Appeals entered its decision on February 17, 1981. (Apx. B) Petition for Rehearing was denied on April 15, 1981. (Apx. B-1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions and statutes involved in the argument are cited as follows: 42 U.S.C., §1983; 28 U.S.C., §1331; 28 U.S.C., §1343; Fifth Amendment to the Constitution of the United States; Fourteenth Amendment; Constitution of Mississippi (1890), Article 3, §17. The full text of these provisions is contained in the Appendix. (Apx. C)

STATEMENT OF THE CASE

The question is whether the District Court had subject matter jurisdiction, challenged by defendants' (petitioners') motion to dismiss the Complaint. The District Court dismissed the Complaint. (Apx. A) The Court of Appeals reversed. (Apx. B) An analysis is required of the allegations of the Complaint that are well pleaded.

The Complaint contains general allegations that defendants, acting in conspiracy, violated plaintiffs' civil rights, citing 42 U.S.C., §1983, et seq., and acquired the plaintiffs' land without adequate compensation in violation of their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, alleging fraud and use of the threat of a taking by eminent domain.

Since it is settled that the bare conclusory allegation of a constitutional violation is not sufficient to confer federal jurisdiction, and since the conclusory denial of constitutional guarantees is to be tested by an appraisal of the totality of circumstances in a given case, especially by pleaded facts, we turn to the *facts* alleged in the lengthy Complaint. In summary, the essential facts that emerge are:

In 1970, plaintiffs (owners) owned a tract of land in Yazoo County, alleged to contain 122 acres. (Comp., p. 4-6)

On February 22, 1972, the plaintiffs executed and delivered to Yazoo County a Warranty Deed conveying title to all of the property to the county. (Comp., p. 11)

The county paid and the plaintiffs received $100,830.00 for the Deed. (Comp., p. 14) The deed covered the 122 acres.

Seven years later (less seven days) and on February 16, 1979, the present suit was filed. (Comp., p. 1)

Plaintiffs have retained the cash consideration and still retain the sum so paid, - offering to return an unspecified part if the Deed is cancelled. (Comp., p. 14)

When the Complaint, containing many conclusory allegations, is reduced to its essentials, plaintiffs allege that while they received $100,830.00 for their property, this

was not enough; that the land was in fact worth four times this amount and that they were induced to sell to the county by the fraud and deceit of their own attorneys and appraiser who are said to have acted in conspiracy with the remaining defendants to acquire the land for a fraction of its true worth.

One circumstance alleged to have been included as one means of inducing the plaintiffs to sell was that the defendants caused the City of Yazoo City to file an eminent domain suit with no intention by the City of ever acquiring the property itself. This suit, if tried, afforded to the landowners the right to obtain just compensation through the verdict of the eminent domain court. The landowners could have but did not appear in the court of eminent domain to either question the intent of the city in filing the action or to have that court fix a price for the land. Instead, they chose to negotiate a private sale to Yazoo County. The eminent domain suit never came to trial; hence there was no taking thereby.

The Complaint seeks to recover damages for the alleged fraud and deceit, measured by the difference between the $100,830.00 received from Yazoo County and retained by plaintiffs and the amount now alleged to be the real value of the property. In the alternative, plaintiffs demand cancellation of their Deed and return of the land conveyed to Yazoo County in 1972.

In any view of the Complaint, it comes down to a concession that title was conveyed by deed to Yazoo County for a substantial consideration, followed by the allegation that the plaintiffs were induced to sell too cheap, because of fraud and deceit practiced upon them by their own attorneys in conspiracy with employees of the public authority, acting in their "propriety" capacities, for which damages are demanded.

ARGUMENT AMPLIFYING THE REASONS FOR ALLOWANCE OF THE WRIT

A. Summary of Reasons

1. The decision below conflicts with the recent decision of this Court in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1976). See also: *Baker v. McCollan,* 443 U.S. 137, 99 S.Ct. 2689 (1979).

In the cited cases, the Court declined to read the Fourteenth Amendment's Due Process Clause as securing a right to be free of injury whenever the State may be characterized as the tortfeasor. The Court also cautioned against making of the Constitution a "font of tort law" to be superimposed upon whatever systems may already be administered by the states. The analogy between the common law tort of a libel, published by a public officer, as in *Paul v. Davis,* supra, and the tort of false imprisonment, committed by a sheriff, as in *Baker v. McCollan,* supra, and the common law tort of alleged fraud in the negotiation of a commercial contract of purchase and sale of land is clear, hence the conflict is apparent.

2. The decision is in conflict with the decisions of other federal courts of appeal, especially: *Beistline v. City of San Diego,* 256 F.2d 421 (CA 9, 1958), and *Warrington Sewer Company v. Tracy,* 463 F.2d 771 (CA 3, 1972).

These cases are directly and factually in point. The lower Court's attempt to distinguish the two cases relies upon a distinction without a difference. Even if the eminent domain action filed by the City was designed to induce the landowners to negotiate a sale to Yazoo County, the alleged fact is simply another circumstance preceding the negotiation leading to the contract of purchase and sale and does not convert a simple common law tort of

alleged fraud and deceit into a "constitutional tort". In *Beistline,* there also was filed a condemnation action and the allegation there, as here, was "that the condemnation suit constituted compulsion and duress", which was alleged to have been a factor in inducing the sale. Therefore, the conflict among the circuits is clear.

3. The case involves an important question of federal law which has not been (except by analogy), but should be, settled by this Court.

Involved here is a classic common law tort issue on which the validity of the land contract depends. The law applicable is state law. The attempt of plaintiff is to ride on the back of the Civil Rights Act into the federal court. This has become a popular legal sport of lawyers everywhere. In proof of this, the United States Code Annotated carries over 1,000 pages of annotations under §1983 and the federal courts continue to be inundated with this flood of cases claiming §1983 status.

Obviously, application of 42 U.S.C., §1983 in a multitude of situations is a constantly recurring issue of vast magnitude and the search continues for some meaningful guidelines by which to test jurisdictional claims and, hopefully, to measure the limits beyond which the federal courts will be unwilling to venture in pre-empting the type of litigation which traditionally has been left to the judicial system administered by the states.

The case is important, therefore, for several reasons. *First,* the decision below serves to expand significantly the involvement of the federal judicial system with classic common law torts under the aegis of 42 U.S.C., §1983. *Second,* the decision impinges further upon the traditional prerogative of the state judicial system to resolve controversies arising out of asserted common law causes of

action and invites unnecessary conflicts between the two judicial systems. *Third,* the decision, if followed in principle, will push the federal courts another long step toward making a "font of tort law" of the Fourteenth Amendment and in the direction of using the civil rights statutes to create a body of general federal tort law, contrary to the caveat expressed in *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1976). *Fourth,* to the extent that the decision allows the federal court in a collateral proceeding, to call into question the intent of the public authority in filing a condemnation action, it sets the stage for federal court collateral review of all eminent domain proceedings by the public authority, as well as all negotiated acquisitions of land, all on naked claims that the Constitution was not served because the acquisition price, on reflection, was not high enough to suit the landowner.

B. Statement of General Principles

Certain general principles that are relevant to the subject at hand have been established in the case law and these will be stated as a backdrop to our specific discussions of the plaintiffs' efforts to fit the instant case into the federal jurisdictional concept.

Plaintiffs allege that a cause of action in federal court exists under 42 U.S.C., §1983. This argument was rejected in *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 99 S.Ct. 1905 (May 14, 1979). The Court held that the Civil Rights Act of 1871 "did not provide for any substantive rights - equal or otherwise"; that the Act is procedural only, giving a remedy but not any rights at all, and since it does not protect anyone from anything, one may not go into Court and claim a violation of 42 U.S.C., §1983.

It follows that 28 U.S.C., §1343(3), relied upon by the plaintiffs, can apply to the present action only where the action is brought to redress the deprivation of rights "secured by the Constitution" of the United States, since no Act of Congress other than the Civil Rights Act is cited as a jurisdictional basis.

The federal question jurisdictional section, 28 U.S.C., §1331, also relied upon by plaintiffs, requires that the action be one which "arises under the Constitution, . . . of the United States".

As held in *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979):

> "The first inquiry in any §1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' If there has been no such deprivation, the state of mind of the defendant is wholly immaterial. . . ." (99 S.Ct. at 2692)

In an effort to plead a case for the exercise of federal jurisdiction, plaintiffs allege generally the violation of the Fifth and Fourteenth Amendments, but these allegations are conclusory only and the facts pleaded do not support the constitutional claims.

Bare allegations of deprivation of rights arising under the Constitution without allegations of factual support do not suffice to establish federal question jurisdiction. *Guedry v. Ford*, 431 F.2d 660, 664 (CA 5, 1970); *Warrington Sewer Co. v. Tracy*, 463 F.2d 771 (CA 3, 1972); *Schroeder v. Federal National Mortgage Association*, 432 F.Supp. 114 (D.C., Puerto Rico, 1977); *Beistline v. City of San Diego*, 256 F.2d 421 (CA 9, 1958). Cf. *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979).

If this were not so, few cases could escape jurisdictional claims, because it is easy to allege a conclusory deprivation of constitutional rights.

There are several tests for the determination of federal question jurisdiction and these are stated by Mr. Justice Cardozo in *Gully v. First National Bank of Meridian*, 299 U.S. 109, 57 S.Ct. 96 (1936) as follows:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. Starin v. New York, 115 U.S. 248, 257, 6 S.Ct. 28, 29 L.Ed. 388; First National Bank v. Williams, 252 U.S. 504, 512, 40 S.Ct. 372, 374, 64 L.Ed. 690. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. Id.; King County v. Seattle School District, 263 U.S. 361, 363, 364, 44 S.Ct. 127, 128, 68 L.Ed. 339. . . ." (57 S.Ct. at 98)

Even a suit to enforce a right which takes its origin in the laws of the United States is not, for that reason alone, one arising under the laws in the jurisdictional sense. Mr. Justice Cardozo continued to say in *Gully*, supra, that:

> ". . . 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result

depends.' Shulthis v. McDougal, 225 U.S. 561, 569, 32 S.Ct. 704, 706, 56 L.Ed. 1205. Cf. First National Bank v. Williams, supra; Hopkins v. Walker, 244 U.S. 486, 489, 37 S.Ct. 711, 61 L.Ed. 1270; Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507, 20 S.Ct. 726, 44 L.Ed. 864...." (57 S.Ct. at 98)

Property rights and interests are created by the state and not by the Constitution of the United States, which simply protects the rights so created. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972).

The public authority is not limited to acquisitions of property by eminent domain. Without violating the Constitution, it may contract for the property as well. As held in *Albrecht v. United States*, 329 U.S. 599, 67 S.Ct. 606 (1947):

> ". . . The Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. See Danforth v. United States, 308 U.S. 271, 60 S.Ct. 231, 84 L.Ed. 240. Nor does it bar them from embodying that agreement in a contract as was done here...." (67 S.Ct. at 608)

Mississippi's statute law expressly confers upon the counties the right to acquire property by purchase, as well as by eminent domain. Miss. Code of 1972, §59-9-19. (Apx. C)

Once "agreeing between themselves" is accomplished, the Constitution is satisfied and from that point forward, federal law is not involved, - only the common law is relevant in measuring the quality and effect of the contract of the parties. Otherwise, every land acquisition by a state agency would be subject to federal court review.

C. The Decision Below Conflicts With Applicable Decisions of This Court

In two recent cases, this Court has addressed the question whether §1983 and §1343(3), jurisdictional companions, can be used to channel into federal court actions in tort to recover damages against a state agency or those acting in its behalf. These are *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976), and *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979).

Emerging from the decisions in these two cases is the caveat that 42 U.S.C., §1983 is available only when the right invaded can be identified as one "secured by the Constitution", and further, that the mere right to be free from common law torts, such as public libel and false imprisonment, is not a right "secured by the Constitution" in the jurisdictional sense. In *Paul v. Davis*, supra, there was involved a libel published by a police department. In *Baker v. McCollan*, there was involved a false imprisonment by a county sheriff. These invasions of reputation and liberty, respectively, were viewed as common law torts with the remedy to be sought in the state court under tort-law principles, and not as §1983 actions in federal court.

So it is here. Just as libel or false imprisonment "does not become a violation of the Fourteenth Amendment merely because the defendant is a state official", *Baker v. McCollan*, so it is that "fraud and deceit" in the negotiation of a formal contract for the sale of land does not become unconstitutional, merely because the purchaser is a state agency and the actors are its representatives.

Plaintiffs' constitutional claim of unjust taking rests squarely upon the assertion that the 1972 agreement (deed) was illegal because of alleged fraud, duress and abuse of

process. But the deed is either valid or invalid according to state law. The issue, therefore, is an issue of state law. The issue, moreover is factual only and upon the decision of this fact issue depends the answer to the question of whether plaintiffs retained any property interest as determined by state law for which the protection of the Constitution could be claimed.

The action of fraud and deceit has always been recognized as a tort actionable at common law. Cf. 37 Am.Jur. 2d, *Fraud and Deceit*, 33, §12. In Mississippi, the remedies are recognized and comprehensive, as to which see *Brown v. Ohman*, 42 So.2d 209 (Miss. 1949), wherein the rule is summarized in Headnote No. 3 as follows:

> "Purchasers of realty could seek rescission of contract for sale of land and damages in alternative for fraud and deceit, and where realty had passed into hands of a third party, damages could be awarded in their favor against vendor." (42 So.2d at 209)

Moreover, the remedies at common law are preserved by Mississippi's Constitution in relation to the taking of property by the public authority. (Apx. C)

In *Parker v. State Highway Commission*, 173 Miss. 213, 162 So. 162 (1935), the Court held that the constitutional provision was self-executing and that an owner had a remedy for the taking at common law. See Headnote No. 3 which states:

> "Constitutional provision against taking or damaging private property for public use without due compensation held mandatory and self-executing, so as to entitle owner of property damaged for public use to remedy at common law, in absence of statute providing redress. . . ." (162 So. at 162)

If a state court holds the deed to be valid, plaintiffs own no property and enforcement of the state-created property right conveyed by the deed and vested in the county could not violate the Constitution. If the state court rules that the deed is illegal, then the litigation will be ended, because the relief will be forthcoming as a matter of course under state law.

Since in the instant suit, the invalidation of a deed and the recovery of damages in tort for alleged fraud and duress is the principal objective, the alleged deprivation of constitutional rights is asserted only as a means of achieving that objective. When state laws and remedies are totally adequate, as they are here, this collateral invocation of constitutional rights is not enough on which to predicate federal jurisdiction.

In *Pierre v. Jordan*, 333 F.2d 951 (CA 9, 1964), the principle was articulated as follows:

> ". . . Where there is some other principal objective of the litigation, and the deprivation of constitutional rights is asserted only as a means of achieving that objective, the subject matter is not cognizable under the Civil Rights Act, and district court jurisdiction thereunder is lacking." (333 F.2d at 958)

In *Walker v. Bank of America National Trust & Savings Association*, 268 F.2d 16 (CA 9, 1959), the Court (citing *Beistline v. City of San Diego*, supra), held:

> ". . . The gist of this action, in so far as the complaint by any possibility states a claim on which relief can be granted, is common-law fraud or conspiracy, and the violation of a duty under a California statute to notify appellant of her right to benefits under the California Workmen's Compensation Law. West's Ann.Cal. Labor Code, § 3201 et seq. The rights

created by the federal statutes to which reference has been made are not essential elements of such a cause of action. The fact that it may be necessary in the course of the litigation to construe these or other federal statutes is not sufficient to give application to 28 U.S.C.A., §1331." (268 F.2d at 23)

D. Cases Distinguished

The Fifth Circuit leaned heavily upon *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773 (1946), citing this case to the conclusion that federal jurisdiction is controlled by the "pleader's purposes" to seek recovery under the Constitution. This case, however, is not even close to the situation in the case at bar.

In *Bell*, the bedrock of the claim was the right to be free from "unreasoanble searches and seizures", - a right expressly vested and guaranteed by the Constitution. An unlawful seizure is, of course, also a trespass under state law. However, the complaint in *Bell* isolated the precise constitutional violation - unreasonable search and seizure - and based the action thereon.

But the tort of "fraud and deceit", alleged in the case at bar, is not mentioned in the Constitution and the *only* tort on which recovery could be had is one at common law. Here, the Constitution is not the substantive *source* of the permissible recovery but only the *means* which the plaintiffs seek to utilize to get the common law tort redressed in federal instead of state court.

If every common law tort could be transformed into a constitutional tort by the ipse dixit of the pleader, there would be no end in sight.

The Fifth Circuit then cites with some confidence *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961), but the

points of distinction between that case and the case at hand were articulated in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976) as follows:

> "This understanding of the limited effect of the Fourteenth Amendment was not lost in the Court's decision in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). There the Court was careful to point out that the complaint stated a cause of action under the Fourteenth Amendment because it alleged an unreaonable search and seizure violative of the guarantee 'contained in the Fourth Amendment [and] made applicable to the States by Reason of the Due Process Clause of the Fourteenth Amendment.' Id., at 171, 81 S.Ct. at 476, 5 L.Ed.2d, at 496. Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101-102, 91 S.Ct. 1790, 1797-98, 29 L.Ed.2d 338, 347-48 (1971); a fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law." (96 S.Ct. at 1160)

E. There Is a Direct Conflict With Other Circuits

There are two decisions in conflict, one from the Ninth Circuit and one from the Third Circuit.

One is *Beistline v. City of San Diego*, 256 F.2d 421 (CA 9, 1958), cert. den., 358 U.S. 865, 79 S.Ct. 96 (1958). Here, the City filed a suit to condemn the plaintiff's land for use as an airport, following which plaintiff sold the property to the City. The City did not use the land for an airport but several years later sold it at a considerable profit to a private party for private use. The plaintiff sued to rescind the sale and for an accounting of profits, claiming fraud and duress and a taking without due process of law in violation of the Fourteenth Amendment. Plaintiff sought to base jurisdiction on 28 U.S.C. §1331. A motion to dismiss was sustained. In affirming the dismissal, the Court of Appeals concluded:

> "But were we to assume that appellant could plead or prove facts which would entitle him to try the issues of fraud and duress, he still would not be entitled to bring his action in the federal court. Every case involving fraud and duress does not involve a constitutional question of due process. A general allegation of a constitutional issue is sufficient, but the claim or fact upon which the constitutional issue is raised must be pleaded, and 'well-pleaded'. 2 Moore, Fed. Prac. & Proc. § 8.09, p. 1630 (2d 1957). The facts here, interpreted most favorably toward appellant, show no deprivation of due process by the City of San Diego in the acquisition of the property and call for the application of the rule of Gully v. First National Bank in Meridian, 1936, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70, as applied by the court below, and as fol-

lowed in Rosecrens v. William S. Lozier, Inc., 8 Cir., 1944, 142 F.2d 118. . . ."

Also:

"If the plaintiff can plead and prove a good case of fraud and duress, his remedy lies, as it does with any other litigant, in the state court." (256 F.2d at 425)

The second, from the Third Circuit, is short, but covers every point in the case at bar. In *Warrington Sewer Co. v. Tracy*, 463 F.2d 771 (CA 3, 1972), the Court said:

"A resolution was adopted by the Board of Supervisors of Warrington Township on February 9, 1971 purporting to exercise an option to purchase a sewer plant pursuant to an agreement executed between Warrington Township (Township), the appellant Warrington Sewer Co. (Warrington) and Meade Construction Co., Inc. on October 7, 1965.

"Warrington brought suit under 28 U.S.C.A. §1331 seeking preliminary and permanent injunctions against appellees insofar as they may interfere with the ownership, possession, management and control by Warrington of the sewage disposal facilities under the February 9 resolution. Appellant also sought a judgment declaring the agreement of October 7, 1965 null and void.

"The Township filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. The court granted the motion in a memorandum opinion and order on June 21, 1971.

"The appellant argues that the taking of the sewer company under the 1965 agreement constitutes a condemnation, accomplished without either just compen-

sation or procedural due process. The trial judge observed that Warrington's constitutional claim of unjust taking rested squarely on the illegality of the 1965 agreement:

> " 'In the instant case, plaintiff predicates his constitutional claim upon the enforcement of the alleged illegal contract by Township. The validity of that contract, however, is an issue of state law and does not give rise to federal jurisdiction. If a state court rules the contract illegal, then, as in the West Park Avenue case, the litigation will be ended. Conversely, if the state court holds the contract to be valid, enforcement would, a fortiori, not violate the Constitution. Neither alternative presents any possibility of a conflict with the Constitution, and accordingly there is no federal question jurisdiction.'

"The retention of jurisdiction of the claim based on state law may be sustained as proper only if the federal question is substantial. Elberti v. Kunsman, 376 F.2d 567 (3rd Cir. 1967). 'A mere incidental or collateral federal question may appear, or may lurk in the background of the record, but this is not a sufficient or adequate basis upon which federal jurisdiction may attach.' Screven County v. Brier Creek Hunting & Fishing Club, 202 F.2d 369, 370 (5th Cir. 1953), cert. den. 345 U.S. 994, 73 S.Ct. 1136, 97 L.Ed. 1402 (1953); Jemzura v. Belden, 281 F.Supp. 200 (N.D. N.Y. 1968). The test for determining whether a complaint presents a federal question is

> " 'whether the complaint is for a remedy expressly granted by an act of Congress or otherwise

"inferred" from federal law, or whether a properly pleaded "state created" claim itself presents a "pivotal question of federal law," for example because an act of Congress must be construed or " 'federal common law' govern[s] some disputed aspect" of the claim.' (citations omitted)

"Appellant's principal argument is based on the theory that the option agreement is invalid because of duress. Warrington's cause of action does not have, as an essential element, a right or immunity created by the Constitution or laws of the United States. See Gulley v. First National Bank in Meridian, 299 U.S. 109, 112, 57 S.Ct. 96, 81 L.Ed. 70 (1936); Beistline v. City of San Diego, 256 F.2d 421 (9th Cir. 1958); cert. den. 358 U.S. 865, 79 S.Ct. 96, 3 L.Ed.2d 98 (1958). There is no genuine and present controversy with respect to the 14th Amendment claim. A bare allegation of violation of the due process clause of the Fourteenth Amendment is not sufficient to confer federal jurisdiction. Lang v. Colonial Pipeline Co., 266 F.Supp. 552 (E.D. Pa. 1967), aff'd. 383 F.2d 986 (3rd Cir. 1967). The Fifth Amendment applies only to action or conduct by the federal government, and one is alleged here. Lang, supra.

"The Judgment of the district court will be affirmed." (463 F.2d at 721-722)

The Fifth Circuit would distinguish the Ninth and Third Circuit cases on the ground that, in the present case, one circumstance which allegedly influenced the respondents to sell the land was the alleged fact that the City of Yazoo City, in conspiracy with the other defendants, filed an eminent domain action to take the property with-

out any intent of acquiring ownership and that this had a coercive influence upon respondents.*

This, however, poses a distinction without a difference. A similar action was pending in *Beistline* and it was alleged in that case "that the condemnation suit constituted compulsion and duress". There was no "taking" by expropriation, because the action never came to trial. Therefore, if the mere filing had any influence, it was not by force of expropriation. Instead, respondents chose to forego an award of just compensation through the eminent domain court and elected to negotiate a sale to Yazoo County. The background existence of the lawsuit could be considered as only one means to that end result.

Moreover, as applied to the lower court's questioning of the motivation behind the state court eminent domain proceedings, the forum for testing the validity and good faith of the petition seeking expropriation was the court in which the proceedings were pending, - not the federal court in a collateral proceeding.

The absence of a "taking" is central to these cases. It cannot be overemphasized. The property was sold for money ($100,830.00). Possession was delivered, - not taken. The title was conveyed by deed, - not by force of condemnation. The complaint, therefore, cannot isolate, in constitutional terms, any taking without compensation.

Indeed, the complaint is not that plaintiffs' land was taken but that they were not paid enough. The Constitution, however, was not designed to make the federal courts

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*That court first assumed that Yazoo County had no expropriation powers. This was an error that was pointed out in a petition for rehearing, but the Court, after recognizing the error, still adhered to its view that a distinction existed. (Apx. B-1)

the arbitrators of how much payment is enough for a deed to property purchased at private sale by the public authority. If this were the law, then every land acquisition by purchase would be subject to federal court review. There is, we submit, no license in the case law to so thus expand the jurisdiction of the federal courts and pre-empt the traditional role of the state court system in the area.

CONCLUSION

When does an alleged abuse of governmental power in common law tort form acquire the stature of a constitutional violation for federal jurisdictional purposes?

Instead of leaving this important question to be answered by the ipse dixit of the pleader or even the subjective appraisal of a judge on an ad hoc basis, we submit that guidelines in this sensitive area of potential conflict with state judicial systems should be established by this court at the earliest opportunity. That opportunity is now at hand.

The decision below has no precedent to support it. It is contrary to the decisions in other circuits. It opens the floodgates a little wider to admit a broad new category of cases over which the federal courts are to extend jurisdiction. It extends the boundaries of §1983 application beyond anything heretofore experienced. By analogy it is contrary to decisions of this Court dealing with similar issues. At best, it leaves a legacy of confusion where clearly drawn guidelines are necessary to avoid wasting the energies of the federal courts in litigation of essentially

local issues of state law traditionally resolved by state courts.

Respectfully submitted,

VARDAMAN S. DUNN, Attorney for Yazoo County, Mississippi; Yazoo County Port Commission; Yazoo County Industrial Development Corporation

W. F. GOODMAN, JR., Attorney for Yazoo City, Mississippi; Yazoo Public Service Commission; Tom Campbell, Jr., and E. A. Smith

HALEY BARBOUR, Attorney for William H. Barbour and William T. Neely

W. TIMOTHY JONES, Attorney for Joel Stevenson

Attorneys for Petitioners

APPENDIX

APPENDIX A

(Filed June 22, 1979)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J79-0078(N)

JONEZ P. SUTHOFF, FRANCES P. MILLER
AND INEZ W. PHILIBERT
PLAINTIFFS

VS.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; YAZOO COUNTY, MISSISSIPPI; YAZOO COUNTY PORT COMMISSION; YAZOO CITY, MISSISSIPPI; YAZOO PUBLIC SERVICE COMMISSION; WILLIAM H. BARBOUR; TOM CAMPBELL, JR.; E. A. SMITH; WILLIAM T. NEELY; AND JOEL STEVENSON
DEFENDANTS

MEMORANDUM OPINION

The plaintiffs filed this purported civil rights action against a group of defendants:

Yazoo County, Mississippi;

Yazoo County Port Commission;

Yazoo County Industrial Development Corporation;

Yazoo City, Mississippi;

Yazoo Public Service Commission;

E. A. Smith, a member of the Yazoo Public Service Commission;

Tom Campbell, Jr., Attorney for Yazoo City, Mississippi;

William H. Barbour and William T. Neely, former personal attorneys for the plaintiffs;

Joel Stevenson, a real estate appraiser.

Maintenance of this action is attempted under 42 U.S.C. §§ 1983 through 1988 and the Fifth and Fourteenth Amendments to the United States Constitution with jurisdiction claimed under 28 U.S.C. §§ 1331 and 1343(3). The prayer is for compensatory and punitive damages and attorneys' fees, and, in the alternative, plaintiffs demand the rescission and cancellation of all instruments executed by them in 1972 which conveyed their interests in certain real property.

All defendants have filed Rule 12 motions requesting dismissal of the complaint for lack of jurisdiction and for failure to state a claim for which relief can be granted.

The plaintiffs owned the tract of land in Yazoo County alleged to contain 122 acres. The Yazoo Public Service Commission first expressed an interest in purchasing the property in 1970. Offers to purchase were allegedly made by Smith in January and in late summer of 1970, both of which offers plaintiffs refused. In August of 1971 the City, through Campbell, also allegedly attempted unsuccessfully to purchase the property. On September 2, 1971, the City filed a petition to condemn the property whereupon plaintiffs employed Barbour as their attorney. Barbour was to assist Neely, who had been representing plaintiffs throughout the above negotiations, in the eminent domain action. Plaintiffs, through counsel, later hired Stevenson to appraise the property.

On February 22, 1972, the plaintiffs executed and delivered to the County a Warranty Deed conveying title to all of the 122 acres. The County paid and the plaintiffs

received $100,830.00 for the deed. Plaintiffs continue to retain the sum so paid. On February 16, 1979, the present action was filed.

The complaint contains conclusory allegations, but when reduced to the essentials, plaintiffs allege that while they received $100,830.00 this was not enough; that the land was in fact worth several times this amount; that they were induced to sell by the fraud and deceit of their own attorneys and appraiser; and that the remaining defendants were in a conspiracy to acquire the land for a fraction of its true worth.

The plaintiffs thus are asserting a classic common law action for the common law tort of fraud and deceit. If the plaintiffs indeed have such a claim it is properly redressable only in the state court. The allegations do not reach Federal Constitutional proportions.

The Civil Rights Act requires the deprivation of a right secured by the Constitution and laws of the United States. Yet there has been no violation of a federal constitutional right under the circumstances presented by plaintiffs' claim.

There has been no "taking" of the property by public authorities. An eminent domain suit was filed by the City to take the land but the parties chose not to pursue that proceeding. The plaintiffs had available to them a forum wherein to assert their rights and their views as to value. What occurred instead was a negotiated sale, or a settlement, not with the City but with the County. The question left is not a federal constitutional issue but a question of state tort law, i.e., whether plaintiffs may recover for alleged duress and fraud.

No Fourteenth Amendment or civil rights claim is presented by the circumstances alleged in the plaintiffs' com-

plaint. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976); *Peace v. City of Center, Texas*, 372 F.2d 649 (5th Cir. 1967). Bare allegations of due process violations are not sufficient to confer federal jurisdiction. *Warrington Sewer Company v. Tracy*, 463 F.2d 771 (3rd Cir. 1972); *Beistline v. City of San Diego*, 256 F.2d 421 (9th Cir. 1958), cert. den. 358 U.S. 865, 79 S.Ct. 96, 3 L.Ed.2d 98 (1958).

In view of this decision it is not necessary that the Court rule upon the remaining objections of defendants.

This Court is without jurisdiction. The complaint is to be dismissed without prejudice under an order to be submitted according to the Rules of the Court.

This 5th day of June, 1979.

/s/ Walter L. Nixon, Jr.
United States District Judge

APPENDIX B

Jonez P. SUTHOFF, Frances P. Miller
and Inez W. Philibert,
Plaintiffs-Appellants,

v.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT
CORPORATION et al.,
Defendants-Appellees.

No. 79-2992.

United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 17, 1981.

Landowners brought action against various public agencies and individuals alleging that defendants entered into conspiracy to misuse municipality's expropriation powers by institution of proceedings not intended to condemn in order to coerce landowners to sell their property at a price far below its value to entities not authorized by law to expropriate property. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., dismissed the complaint on its allegations, and plaintiff appealed. The Court of Appeals, Tate, Circuit Judge, held that allegations of the complaint were drawn so as to seek recovery under both federal Constitution and a federal statute and were not immaterial or frivolous, and thus district court had jurisdiction.

Reversed and remanded.

1. Federal Courts (Key) 243

Allegations of landowners' complaint that various public and private persons entered into conspiracy to misuse municipality's expropriation powers, by institution of proceedings not intended to condemn, in order to coerce landowners to sell their property at prices far below its value to entities not authorized by law to expropriate property were drawn so as to seek recovery under both federal Constitution and federal statute and were not immaterial or frivolous, and thus supported federal subject-matter jurisdiction. U.S.C.A.Const. Amends. 5, 14; 42 U.S.C.A. § 1983.

2. Federal Courts (Key) 242

Federal jurisdiction must be sustained if, construed in light of pleader's purposes, the claim is based upon federal Constitution or statutes, whether or not as drafted it also alleges a state cause of action. 42 U.S.C.A. § 1983.

3. Federal Courts (Key) 242

Allegations of concerted action by public and private persons to deprive individuals of federal Constitutional rights through color of state law are sufficient to sustain federal jurisdiction. 42 U.S.C.A. § 1983.

4. Civil Rights (Key) 13.5(1)

An action under statute prohibiting the deprivation of rights secured by the Constitution or by federal statutes may be based upon wrongful deprivation of property by persons acting under color of state law. 42 U.S.C.A. § 1983.

5. Civil Rights (Key) 13.5(1)

Actions taken "under color of" state law which are actionable under statute prohibiting the deprivation of

rights secured by the Constitution or federal statutes may include misuse of power possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law. 42 U.S.C.A. § 1983.

6. Conspiracy (Key) 7.6

Landowners' allegations that various public agencies and private individuals conspired to misuse municipality's expropriation powers afforded basis for federal action under statute prohibiting the deprivation of federally-secured rights where, even if a tort was alleged, it was accomplished by an abuse of governmental power sufficient to raise it to stature of a violation of the Constitution and where the allegations adequately stated claim of deprivation of property without due process of law in violation of the federal Constitution. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 5.

7. Federal Courts (Key) 242

Applicable test for determining jurisdiction on face of pleadings is not whether plaintiffs could actually recover but whether federal claim alleged is so patently without merit as to justify district court's dismissal for want of jurisdiction.

Pyles & Tucker, Dixon L. Pyles, Jackson, Miss., for plaintiffs-appellants.

Watkins & Eager, W. F. Goodman, Jr., Jackson, Miss., for Yazoo City, Miss., Yazoo Public Service Comm., Campbell and Smith.

Henry, Barbour & Decell, Haley Reeves Barbour, Yazoo City, Miss., for Barbour and Neely.

Vardaman S. Dunn, Jackson, Miss., for Yazoo County Ind. Dev., Yazoo County and Yazoo Port Comm.

W. Timothy Jones, Jackson, Miss., for Joel Stevenson.

Appeal from the United States District Court for the Southern District of Mississippi.

Before INGRAHAM, GEE and TATE, Circuit Judges.

TATE, Circuit Judge:

The district court dismissed the plaintiffs' complaint on its allegations, as failing to state a claim over which it had subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). The plaintiffs had, inter alia, specifically alleged conduct of the defendants that had allegedly under color of state law deprived them of property rights without due process of law in violation of the Fifth and Fourteenth Amendments, citing 42 U.S.C. § 1983, and had averred federal jurisdiction under 28 U.S.C. § 1331 and 1343(3).

The issue before us is narrow: Was the federal court without jurisdiction conferred by Congress to decide the case, on the face of the complaint, under the stringent test enunciated by *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); "[W]here the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions . . . *must* entertain the suit." (Italics ours.) (The two exceptions are where the federal question "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Id.) See also *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 156 (5th Cir. 1980).

So tested, the complaint sufficiently states federal claims, and (without intimating as to the merits of the claims) we reverse the district court's dismissal for lack of jurisdiction.

I.

The plaintiffs sue five public agencies of Mississippi and five individuals, on allegations that they entered into a conspiracy to force the plaintiffs to sell their property at one-fourth its value to Yazoo County (hereinafter, the "County"), so that the property could be used for public purposes by the Yazoo County Port Commission ("Port") and the Yazoo County Industrial Development Corporation ("Industrial Corporation"), none of which had expropriation powers. The gravamen of the improper use of state power alleged is that the City of Yazoo City ("City") was induced to institute proceedings to expropriate a portion of the plaintiffs' property for sewerage purposes for the sole purpose of coercing the plaintiffs (for fear of the destruction of the value of their property) into selling their property at a low price to the County, although the City never had any intent to acquire the property for such purpose and, in fact, dismissed its expropriation proceedings after they had served their coercive purpose.

[1, 2] Clearly, the allegations of the complaint are drawn so as to seek recovery under both the federal constitution and a federal statute and thus support federal subject matter jurisdiction absent a finding that the claims are immaterial or frivolous. With respect to the contention of federal immateriality because the allegations also support a state remedy for fraud and deceit, *Bell v. Hood* teaches us that we must sustain federal jurisdiction if, construed in the light of the pleader's purposes, the claim is based upon the federal constitution or statutes, whether or not as drafted it also alleges a state cause of action. 327 U.S. at 681, 66 S.Ct. at 775.

[3-5] Nor can we say the federal claim is so frivolous that the district court may not entertain jurisdiction of it,

if only to dismiss it on its merits. The allegations concern a concerted use by public and private persons to misuse a municipality's expropriation powers, by the institution of proceedings not intended to condemn, in order to coerce a private landowner to sell his property at a price far below its value to entities not authorized by law to expropriate it. Sufficient to sustain § 1983 federal jurisdiction are allegations of concerted action by public and private persons to deprive individuals of federal constitutional rights through color of state law. *Fulton v. Emerson Electric Co.*, 420 F.2d 527 (5th Cir. 1969). A § 1983 action may be based upon the wrongful deprivation of property by persons acting under color of state law. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). Action taken "under color of" state law may include "'[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,'" *Monroe v. Pape*, 365 U.S. 167, 184, 81 S.Ct. 473, 483, 5 L.Ed.2d 492 (1961).

II.

The defendants urge that the plaintiffs' claims are foreclosed by the decision of the Supreme Court in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). That decision can be interpreted, as do the defendants, as holding a tort committed by a state agent does not, without more, afford a basis for a federal § 1983 action. As a predicate for this argument, the defendants contend that there was no "taking" for Fifth Amendment purposes, since the plaintiffs "voluntarily" sold their property, and therefore the complaint at most alleges a tort claim.

[6] We are not persuaded by these contentions. In the first place, the tort alleged, if such it be, was accomplished by an abuse of governmental power sufficient

" 'to raise an ordinary tort by a government agent to the stature of a violation of the Constitution.' " *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir. 1980). In the second place—for purposes of maintaining initial federal jurisdiction, even though the property itself is not actually "taken" —allegations that an individual's property rights have been damaged, through a municipality's arbitrary misuse of instituted but abandoned state-law expropriation proceedings, adequately state a claim of deprivation of property without due process of law in violation of the federal constitution. *Foster v. Herley*, 330 F.2d 87 (6th Cir. 1964). See also *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784 (8th Cir. 1979); cf., *Chacon v. Granata*, 515 F.2d 922, 924 (n.3) (5th Cir. 1975).

The present situation thus differs from that in decisions relied upon by the defendants, where no federal claim arises out of the forced sale of property because of the coercive but valid exercise of expropriation power by a defendant state agency authorized to take the property, *Beistline v. City of San Diego*, 256 F.2d 421 (9th Cir. 1958), or where the governmental duress alleged is not shown to have as its basis a violation of the federal constitution (such as, here, the misuse of the threat of the expropriation power to force the landowner to sell his property to entities or persons *not* entitled to take it by eminent domain), *Warrington Sewer Company v. Tracy*, 463 F.2d 771 (3rd Cir. 1972).

Conclusion

[7] The applicable test for determining jurisdiction on the face of the pleadings is not whether the plaintiffs could actually recover, but whether the federal claim alleged is so patently without merit as to justify the district court's dismissal for want of jurisdiction. *Duke Power*

Comp[illegible]y v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978). We do not necessarily hold that plaintiffs will prevail if they establish the facts alleged in the petition; we hold only that, taking the facts alleged in the complaint as true, the plaintiffs have established their right to a day in federal court. The dismissal for want of subject matter jurisdiction is REVERSED, and the case is remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

APPENDIX B-1

Jonez P. SUTHOFF et al.,
Plaintiffs-Appellants,

v.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION et al.,
Defendants-Appellees.

No. 79-2992.

United States Court of Appeals,
Fifth Circuit.
Unit A

April 15, 1981.

Landowners brought action against various public agencies and individuals alleging that defendant entered into conspiracy to misuse municipality's expropriation powers by institution of proceedings not intended to condemn in order to coerce landlords to sell their property at a price far below its value to entities not authorized by law to expropriate the property. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., dismissed the complaint and appeal was taken. The Court of Appeals, Tate, Circuit Judge, 637 F.2d 337, reversed and remanded. On petition for rehearing, the Court of Appeals held that even if it was error to assume that county did not have power to expropriate, court had jurisdiction of suit.

Petition denied.

Federal Courts (Key) 192

Even if panel of court was in error in assuming that county did not have power to expropriate, federal court had jurisdiction of suit, seeking recovery under Federal Consitution and federal statute for public agencies and individuals alleged conspiracy to misuse municipality's expropriation powers by instituting proceedings not intended to condemn in order to coerce landowners to sell property far below its value.

Appeal from the United States District Court for the Southern District of Mississippi.

On Petition For Rehearing

(Opinion February 17, 1981, 5th Cir., 1981, 637 F.2d 337)

Before INGRAHAM, GEE and TATE, Circuit Judges.

PER CURIAM:

On petition for rehearing, the defendants-appellees suggest that the panel erred in assuming that Yazoo County did not have the power to expropriate, since Yazoo County has the power of expropriation for port commission purposes. See Miss.Code § 59 9 19.

Accepting the validity of the petitioner's assertion for the purpose of determining the jurisdictional issue solely presented on appeal, we conclude that the gravamen of our original holding need not be altered:

The allegation of the complaint—(a) that public and private persons conspired to misuse a municipality's expropriation powers, (b) through the municipality's institution of eminent domain proceedings with no intent to condemn, and (c) but solely in order to coerce the private

landowners to sell their property at a price far below value to co-conspirator entitles not a party to the condemnation proceedings—are sufficient to state a claim of § 1983 federal jurisdiction for deprivation under color of state law of individual federal constitutional rights.

The petitioners again urge the panel to follow the opinions of two other circuits, *Beistline v. City of San Diego*, 256 F.2d 421 (9th Cir. 1958) *cert. denied* 358 U.S. 865, 79 S.Ct. 96, 3 L.Ed.2d 98 (1958), and *Warrington Sewer Company v. Tracey*, 463 F.2d 771 (3d Cir. 1972). However, as we noted in the original panel opinion, both of those opinions are distinguishable from the situation presented on the instant appeal: in neither *Beistline* nor *Warrington* did the property owner allege that the defendant expropriating body *misused* its coercive powers by instituting condemnation proceedings in order to force the price down for the benefit of non-parties, without the condemnor having any intention actually to expropriate the land for public use.

The petition for rehearing is DENIED.

APPENDIX C

42 U.S.C., §1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C., §1331

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

28 U.S.C., §1343

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

CONSTITUTION OF THE UNITED STATES
FIFTH AMENDMENT

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual ser-

vice in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES
FOURTEENTH AMENDMENT

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MISSISSIPPI CONSTITUTION

Section 17. Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

MISSISSIPPI CODE OF 1972

(emphasis added)

§ 59-9-19. Additional powers and authority of county.

The board of supervisors of any county in which there has been created a county port authority or county development commission as provided in this chapter, acting through its county port authority or county development commission, shall have the following additional powers and authority:

(a) To set aside or lease all or portions of said harbor facilities, wharves, docks, sheds, warehouses, elevators, compresses, floating dry docks, graving docks, marine railways, tugboats or any necessary or useful improvements for special purposes for a term not exceeding twenty-five years.

(b) To sell, lease or otherwise dispose of shipyards, shipbuilding facilities, machinery and equipment, dredges, facilities and land acquired for industrial or habor operations to individuals, firms or corporations, public or private, for industrial operations on such terms and conditions and with such safeguards as will best promote and protect the public interest, and they are hereby authorized to transfer possession and/or title to any part or all of such facilities and lands by deed, lease, contract, or other customary business instrument; however, no such lease of land or facilities acquired for industrial operations shall be executed for a term in excess of ninety-nine years from its date, and before the execution of the same any such deed, conveyance, lease, contract, or other disposition shall be authorized by the affirmative vote of at least two-thirds (2/3) of the membership of such port authority or development commission by order or resolution entered on its minutes, which order or resolution shall set forth the sub-

stantial terms of such deed, conveyance, lease, contract, or other disposition.

In the letting of contracts and in the advertisement for bids thereon, for the development, construction, repair, maintenance, or operation of any structures, facilities and lands required pursuant to any of the provisions of this chapter, the board of supervisors and the county port authority shall comply with all of the requirements of the general laws of the State of Mississippi governing the advertisement for bids and the letting of contracts by county boards of supervisors. In the event title to any such lands under jurisdiction of the port authority or development commission is in the name of the county, no such transaction shall be consummated until and unless the same be authorized by proper resolution of the port authority or development commission and of the county, in which event the county shall join the port authority or development commission in the execution of such instrument. Any such sale or lease may be executed upon such terms and conditions and for such monetary rental or other consideration as may be found adequate and approved by the county port authority or county development commission and the board of supervisors in orders or resolutions authorizing the same. Any covenants and obligations of the lessee or purchaser to make expenditures in determined amounts and within such time or times for improvements to be erected on the land by such lessee or purchaser and to conduct thereon industrial operations in such aggregate payroll amounts and for such period of time or times as may be determined and defined in such lease or conveyance, and to give preference in employment where practicable to qualified residents of the port of entry and of the county and/or state in which such port is situated, shall, if included in such lease or conveyance, constitute and be deemed sufficient consideration for the execution of

any such lease or conveyance in the absence of a monetary rental or other considerations; any such lease may contain reasonable provisions giving the lessee the right to remove its or his improvements upon termination of the lease. Where the rentals provided in the lease will be sufficient to fully retire the cost of the particular facility or where the monetary consideration for a deed is sufficient to fully repay the cost of land acquired for industrial operations described in said deed, contracts for construction, repairs, maintenance and operation of the facility or for the sale of the land, may be negotiated and consummated with the lessee of the facility or the purchaser of the land without the necessity of advertising and obtaining competitive bids therefor. *Such county, acting through the port authority or development commission,* shall have the right to reclaim submerged lands for such purposes and *shall also have the right to acquire by eminent domain proceedings, purchase or otherwise, any land or estate therein or property and rights that may be necessary for the purposes of this chapter,* provided that land acquired for industrial operations by eminent domain shall be leased or shall be sold only with such provisions in the deed or lease as shall insure that the use of the land shall be beneficial to the carrying out of the purposes of this chapter and the promotion of commerce through said port. The county, acting through the port authority or development commission, shall have no authority or power to acquire without the consent of the owner thereof any property operated or used for port, harbor or industrial operations, or for such purposes as the county, acting through the port authority or development commission, is authorized to acquire and use such property for, where such property has been sold or leased by the county, acting through the port authority or development commission, to any person, firm, or corporation for industrial operations as provided in this chapter.

In the exercise of eminent domain, the county, acting through the port authority or development commission, shall determine the amount and character of the land or estate therein thus to be acquired and the public necessity for such exercise and their determination shall be conclusive and shall not be subject to attack in the absence of manifold abuse of discretion or fraud on the part of said county in making such determination and said county, acting through the port authority or development commission, *shall have all powers and authority vested in persons or corporations having the right of eminent domain by sections 11-27-1 to 11-27-49, Mississippi Code of 1972, and all other statutes pertinent thereto.*

(c) To accept assurances and other agreements from persons, firms and corporations who are benefited by any action of the port authority pursuant to this chapter, including agreements to save the county harmless on account of any assurances given by the county to the United States of America or any agency thereof, including the Secretary of the Army, and to enter into contracts with such persons, firms or corporations relative to the future development and use of property owned by such persons, firms or corporations.

(d) To obligate the county by contract with persons, firms and corporations owning or agreeing to purchase property in the area benefited by any action of the port authority under the provisions of this chapter for the construction, development, improvement or expansion of channels and other navigation projects by the county at its expense and the continued maintenance and operation thereof by the county at its expense for a period of time not to exceed ninety-nine years, or so long as any such person, firm or corporation continues to use said property for industrial operations.

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No. 80-1975

In the Supreme Court of the United States

October Term, 1981

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL.,
Petitioners,

vs.

JONEZ P. SUTHOFF, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED FOR REVIEW

1. Was the federal district court without jurisdiction conferred by the Congress to decide the case, on the face of the complaint, under the stringent test enunciated by *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946), where the complaint is so drawn as to seek recovery directly under the Constitution and laws of the United States, and where the federal question clearly appears material and the claim is wholly substantial and not frivolous?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1
STATEMENT OF THE CASE 2
REASONS WHY THE WRIT SHOULD BE DENIED 4
CONCLUSION 8

Cases Cited

Amen v. City of Dearborn, 532 F. 2d 554, 556, 558-559 5
Baker v. McCollan, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) 4, 7
Beistline v. City of San Diego, 256 F. 2d 421 (9th Cir. 1958) 7
Bell v. Hood, 327 U.S. 678, 681-82, 66 S. Ct. 773, 776, 90 L. Ed. 939 ..... 1, 3
Chacon v. Granata, 515 F. 2d 922, 924, fn 3 (5th Cir. 1975) 5
Dohany v. Rogers, 281 U.S. 362 6
Duke Power Co. v. Carolina Env. Study GP, 438 U.S. 59, 69, 70-71 (1978) 5
Foster v. Herley, 330 F. 2d 87 (6th Cir. 1964) 5
Goldblatt v. Hempstead, 369 U.S. 590 6
Lynch v. Household Finance Corp., 405 U.S. 538 7
Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) 4
Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al., 637 F. 2d 337, rehearing denied 642 F. 2d 822 (5th Cir. 1981) 1, 4, 7, 8
Thomas W. Garland, Inc. v. City of St. Louis, 596 F. 2d 784 (8th Cir. 1979) 5

Warrington Sewer Company v. Tracey, 463 F. 2d 771 (3d Cir. 1972) 7, 8
West v. Chesapeake & P. Tel. Co., 295 U.S. 662 6
Williams v. Kelly, 624 F. 2d 695, 697 (5th Cir. 1980) 4

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States (Fifth Amendment) 4, 5, 6
Constitution of the United States (Fourteenth Amendment) 4, 5, 6
28 U.S.C. §§ 1331 and 1343(3) 5
42 U.S.C. § 1983 ..... 3, 4, 7

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Jonez P. Suthoff, Frances Miller and Inez Philibert, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinions in this case. The opinions are reported in 637 F. 2d 337 (1981) and 642 F. 2d 822 (1981).

STATEMENT OF THE CASE

The respondents brought an "inverse condemnation" action in the federal district court against five public agencies of Mississippi and five individuals. The complaint charges with specificity that the petitioners entered into a conspiracy to force the respondents to sell their private property at one-fourth its value to Yazoo County so that the property could be used for public purposes by the Yazoo County Port Commission and the Yazoo County Industrial Development Corporation. The latter two public agencies did not have expropriation powers.

The complaint alleged that Yazoo City was induced to institute proceedings in the county court to expropriate 82.43 acres of the 122 acre tract of the plaintiffs' property falsely claiming that the portion was to be used for sewerage disposal. The complaint alleges that the true and sole purpose was to coerce the plaintiffs into selling their property at a fraction of its value to the county. The pleading alleges that Yazoo City never had any intent to acquire the property for the announced purpose. In fact the city dismissed the expropriation proceedings when it had served its coercive purpose.

It was alleged in the complaint that Yazoo County "took" 22.75 acres for which no compensation was paid; and that 99.25 acres were "taken" without just compensation. By the coercive tactics the petitioners forced the private landowners to sell their property at a price which was only one-fourth of its real value. Respondents charged in the complaint that 122 acres of their private property were wrongfully "taken" from them by Yazoo County for public use without just compensation in violation of Amendments V and XIV of the Constitution of the United

States, and they were denied due process and the equal protection of the law.

In specific allegations the complaint sets forth that certain public officials and private persons conspired to misuse the expropriation powers of Yazoo City by the municipality's institution of eminent domain proceedings with no intent to actually condemn, but solely in order to coerce the private landowners to sell their private property at a price far below the actual value to conspirator entities who were not parties to the condemnation proceedings. Such allegations are sufficient to state a claim under 42 U.S.C. § 1983 for deprivation under color of state law of individual federal constitutional rights. The allegations of the complaint are drawn so as to seek recovery under the federal constitution and a federal statute. Clearly the allegations support federal subject matter jurisdiction absent a finding that the claims are immaterial or frivolous.

The allegations of the complaint also support a state remedy based on fraud and deceit. Under *Bell v. Hood*, 327 U.S. at 681, federal jurisdiction must be sustained, if construed in the light of the purposes of the respondents in their pleadings their claim is based upon the federal constitution and upon a federal statute, regardless of whether the complaint also alleges a state cause of action.

The allegations of the complaint makes it very clear that the respondents seek recovery squarely on the ground that the petitioners violated the Fifth and Fourteenth Amendments. The complaint charges that the petitioners conspired and acted in concert to do acts prohibited by these amendments, and that the petitioners' conduct pursuant to the conspiracy resulted in damages greatly in excess of $10,000.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision of the Fifth Circuit Court of Appeals does not conflict with the decision of this court in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), nor is there a conflict with *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

Petitioners argue that the decision in the Fifth Circuit Court of Appeals conflicts with decisions of the Court in *Paul v. Davis* and *Baker v. McCollan*.

Paul v. Davis is not applicable to petitioners' claim. The respondent, in *Paul*, pointed to no specific constitutional guaranty safeguarding the interest which Davis asserted had been invaded. 424 U.S. at 700. In *Suthoff, et al.*, the respondents point to Amendments V and XIV. The respondents charge that their private property was taken for public use without just compensation and that the deprivation was also without due process of law. As a predicate to the contention that a tort committed by a state agent, without more, does not afford a basis for a federal § 1983 action, the petitioners assert there was no "taking" for Fifth Amendment purpose because, they say, that respondents "voluntarily" sold their property.

The coercive fraud and deceit practiced by the petitioners on the respondents was accomplished by an abuse of governmental power so gross as to be sufficient " 'to raise an ordinary tort by a government agent to the stature of a violation of the constitution.' " *Williams v. Kelly*, 624 F. 2d 695, 697 (5th Cir. 1980). For purposes of maintaining federal jurisdiction Yazoo City's arbitrary and wrongful misuse of instituted but abandoned state-law expropriation proceedings adequately states a claim of deprivation of property without due process of law in violation of the

federal constitution. *Foster v. Herley*, 330 F. 2d 87 (6th Cir. 1964). See also *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F. 2d 784 (8th Cir. 1979); cf., *Chacon v. Granata*, 515 F. 2d 922, 924, fn 3 (5th Cir. 1975).

Political subdivisions and public agencies such as the petitioners may be sued directly for Fourteenth Amendment violations under 28 U.S.C. §§ 1331 and 1343(3). *Amen v. City of Dearborn*, 532 F. 2d 554, 556, 558-559. The taking of plaintiffs' property without assurance of just compensation is such a "taking" claim as will support federal jurisdiction under 28 U.S.C. § 1331(a). *Duke Power Co. v. Carolina Env. Study GP*, 438 U.S. 59, 69, 70-71 (1978).

The Fifth Amendment to the Constitution of the United States prevents the federal government or its agencies from depriving the plaintiffs of their property without due process of law. The Fourteenth Amendment prevents any action by Mississippi or its political subdivisions which would accomplish such deprivation. The right to acquire, keep and enjoy property is a fundamental right and the protection of this fundamental right is one of the most important objects of government. The constitutionally protected right of property is subject to limitation by means of the *legitimate* exercise of the police power of the state. The word "property" under the Fourteenth Amendment embraces all valuable interests of the plaintiffs, and it includes the right to acquire, use, keep, dispose of and enjoy in ways consistent with the equal rights of others.

"Deprivation" is not defined as it is used in the Fourteenth Amendment. It is certain that "deprivation" includes the taking of approximately 22.75 acres of plaintiffs' private property for which no payment of any kind was made and the failure to pay adequately for the re-

maining 99.25 acreage which was acquired by fraud, deceit and coercion from the plaintiffs who were coerced against their collective wills into conveying the property to Yazoo County. It is well settled as a rule of federal constitutional law that plaintiffs' private lands cannot be "taken" in any manner for public use without just compensation being made to them. It is equally as a well settled principle of federal constitutional law that their property cannot be "taken" for public use without adequate compensation. *West v. Chesapeake & P. Tel. Co.*, 295 U.S. 662.

"Constitutional proportions" in this civil action are reached because the Fifth Amendment requires the federal government to pay for all property taken; and in addition also to pay the "just" compensation due thereon. The Fourteenth Amendment places the same requirements on the defendant public bodies of Yazoo County and upon the individual defendants when acting in concert with governmental entities. The *coerced* taking of the approximately 22.75 acres without any payment therefor, and the failure to pay "just compensation" or the actual value of 99.25 acres is violative of the United States Constitution as "taking" without adequate compensation and it is also a violation of federal constitutional requirement of due process of law. *Dohany v. Rogers*, 281 U.S. 362.

The acts of the local governmental entities in taking private property for purported public use are the proper concern of the federal courts. *Goldblatt v. Hempstead*, 369 U.S. 590. Among the civil rights intended to be protected from unlawful and discriminatory state action by the Fourteenth Amendment are the rights of the plaintiffs to acquire, enjoy, own and dispose of their property. Rights in property are basic civil rights. The right to enjoy their property without Yazoo City unlawfully and

fraudulently coercing them to give away a portion of their property, and to accept inadequate compensation for the remainder is no less a federal constitutional right than the right to speak freely or the right to travel unmolested. The respondents' rights relative to their property are personal rights which rise to federal constitutional proportions. *Lynch v. Household Finance Corp.*, 405 U.S. 538.

The decision of the Supreme Court in *Baker v. McCollan*, cited supra, is not applicable to the issues in respondents' case. McCollan failed to satisfy § 1983's threshold requirement that he was deprived of a right "secured by the Constitution and laws," and hence he had no claim cognizable under § 1983. Section 1983 imposes liability for violation of rights protected by the Constitution of the United States.

2. The decision of the Fifth Circuit Court of Appeals likewise does not conflict with the decisions of any other circuits. There is no conflict in *Suthoff, et al. v. Yazoo County Industrial Development Corporation, et al.*, 637 F. 2d 337, rehearing denied 642 F. 2d 822 (5th Cir. 1981) with *Beistline v. City of San Diego*, 256 F. 2d 421 (9th Cir. 1958) and *Warrington Sewer Company v. Tracey*, 463 F. 2d 771 (3d Cir. 1972).

Beistline and *Warrington* are distinguishable from *Suthoff, et al.* In neither *Beistline* nor *Warrington* did the property owners allege that the expropriating bodies misused their coercive powers by instituting condemnation proceedings in order to force down the price for the benefit of non-parties without the condemnor having any intention to expropriate the land for public use. In *Beistline* the court said no federal claim arises out of the forced sale of property because of the *coercive but valid exercise* of expropriation power by a state agency authorized to

take the property. Likewise, the court said in *Warrington* that no federal claim is present where the governmental coercion is not shown to have its basis in the violation of a federal constitutional right. In *Suthoff, et al.* the misuse of the threat of the expropriation power forced the respondents to sell their private properties to entities not empowered nor entitled to take the land by eminent domain. The complaint in *Suthoff, et al.* stated a valid federal claim because of the violation by petitioners of respondents' constitutional rights.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
Counsel for Respondents